APPELLATE CRIMINAL.

Before Guha and Nasim Ali JJ.

NAYEB SHAHANA

v.

EMPEROR.*

1934
Jan. 3, 9, 15

Evidence—Deposition not taken down by Sessions Judge—Irregularity, when cured—Confession, if admissible after retraction when pardon of accomplice is withdrawn before his examination in Sessions Court—Degree of probability necessary to reject confession as not being voluntary—Code of Criminal Procedure (Act V of 1898), ss. 337 (2), 356 (3), 537—*Indian Evidence Act (I of 1872)*, ss. 3, 24, 154.

When the Sessions Judge omitted to take down the deposition of witnesses in writing himself, or to make a memorandum of the substance of what the witnesses deposed as required by clause (3) of section 356 of the Code of Criminal Procedure, but it appeared from the record that the evidence was taken down in the presence and hearing and under the personal direction and superintendence of the judge, and that the depositions of the witnesses were read over and interpreted to them in the presence of the accused and their pleader and admitted to be correct,

held that the irregularity did not vitiate the trial, but was cured by section 537 of the Code of Criminal Procedure.

Subramania Ayyar v. *King-Emperor* (1) and *Abdul Rahman* v. *The King-Emperor* (2) referred to.

If a particular rule has been prescribed for achieving a particular object and that object has not been defeated by reason of the breach of that rule, it cannot be said that the accused had not a fair trial.

Praphullakumar Sarkar v. *Emperor* (3) referred to.

It is not obligatory upon the prosecution under section 337 (2) of the Code of Criminal Procedure to examine in the Sessions Court an accomplice, who, after accepting a pardon, retracts his confession and his pardon is, in consequence, withdrawn before the trial begins in the Sessions Court.

Before a judge places the confession of the accused before the jury for their consideration as evidence in the case he should carefully consider all the circumstances disclosed in the evidence and come to a decision whether these circumstances do justify a well-founded conjecture which may be sufficient for excluding it from evidence.

In order to justify the rejection of a confession as being irrelevant under section 24 of the Evidence Act, a lesser degree of probability than is required under section 3 of the Act would be necessary.

*Criminal Appeals, Nos. 536 and 592 of 1933, against the orders of G. Waight, Sessions Judge of Burdwan, dated May 5, 1933, and May 16, 1933, respectively.

(1) (1901) I. L. R. 25 Mad. 61; L. R. 28 I. A. 257.
(2) (1926) I. L. R. 5 Ran. 53; L. R. 54 I. A. 96.
(3) (1931) I. L. R. 58 Calc. 1404.

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CRIMINAL APPEAL by the accused.

The facts of the case and arguments in the appeal are sufficiently stated in the judgment.

Narendrakumar Basu, A. S. M. Akram, Md. Manawar and *Jagadishchandra Ghosh* (in No. 536) for the appellants.

Md. Manawar (in No. 592) for the appellant.

Debendranarayan Bhattacharjya for the Crown.

Cur. adv. vult.

GUHA AND NASIM ALI JJ. The eight appellants before us were tried by the Sessions Judge of Burdwan with the aid of a jury on a charge under section 302/120B of the Indian Penal Code, *i.e.*, conspiracy to murder, and were convicted on the majority verdict of the jury and sentenced to transporation for life. The case for the prosecution is that there was a conspiracy to murder one Dr. Akhtar Ali, in pursuance of which he was murdered by some men while he was returning home on the evening of the 29th March, 1932, and that the appellants were some of those conspirators. The appellants' defence was that they were not in the conspiracy and that they knew nothing of the conspiracy.

The first ground urged in support of the appeal is that the trial has been vitiated by the non-compliance with the imperative provisions of section 356 of the Code of Criminal Procedure. It appears that in this case the evidence was not taken down in writing by the judge himself. It appears further that the learned judge did not make a memorandum of the substance of what the witnesses deposed, as required by clause (*3*) of section 356 of the Code of Criminal Procedure. It is clear, however, from the record that the evidence was taken down in the presence and hearing and under the personal direction and superintendence of the judge and that the depositions of the witnesses were read over and

interpreted to them in the presence of the accused and their pleader and admitted to be correct. There was no suggestion, either before the Sessions Judge or before us, that the record of the evidence, which was placed before the jury in this case, is not a correct record of what the witnesses deposed. There is no doubt that there is an omission or irregularity in this case, because the law requires that the judge shall make a memorandum of the substance of the depositions of the witnesses. The question for determination, therefore, is whether this omission or irregularity vitiates the whole trial or whether it is cured by the provisions of section 537 of the Code of Criminal Procedure. The two decisions of the Judicial Committee, *viz.*, *Subramania Ayyar* v. *King-Emperor* (1) and *Abdul Rahman* v. *The King-Emperor* (2), clearly indicate that all violations of the rules of procedure in a criminal trial do not stand on the same footing. The test to be applied is to ascertain whether the accused had a fair trial in spite of the transgression of the prescribed rule of procedure. If a particular rule has been prescribed for achieving a particular object and that object has not been defeated by reason of the breach of that rule, it cannot be said that the accused had not a fair trial. We are not satisfied in the present case that, by reason of non-compliance with the provisions of sub-section (*3*) of section 356 of the Code of Criminal Procedure, the appellants have, in any way, been prejudiced. The object of section 356 is to have an accurate record of the evidence in the case. As already observed, there was not the faintest suggestion in the present case that the evidence, which was placed before the jury, is something different from what the witnesses deposed or that the record is otherwise incorrect or incomplete. We are, therefore, of opinion that there is no substance in the first ground. This view of the matter is in consonance with the recent decision

(1) (1901) I. L. R. 25 Mad, 61; L. R. 28 I. A. 257.

(2) (1926) I. L. R. 5 Ran. 53; L. R. 54 I. A. 96.

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of this Court in the case of *Praphullakumar Sarkar* v. *Emperor* (1).

The second ground urged in support of the appeal is that the appellants have been seriously prejudiced by the manner in which the confession of P. W. 20, Abdul Khan, was introduced as evidence by the prosecution in this case and was read to the accused in the presence of the jury. The relevant facts for the proper appreciation of this point are as follows :—

A magistrate recorded the confession of Abdul Khan on the 22nd April, 1932, under section 164 of the Code of Criminal Procedure. On the 28th June, 1932, pardon was tendered to him under section 337 (*1*) of the Code of Criminal Procedure by the committing magistrate on his giving an undertaking to make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence, and he was examined as a witness for the prosecution. Abdul Khan, however, denied all knowledge of the occurrence and stated before the magistrate that he did not recall anything about the confessional statement alleged to have been made by him. The learned magistrate, therefore, stopped his examination and the pardon tendered to him was withdrawn under section 339 of the Code of Criminal Procedure on the Court Sub-Inspector certifying to the fact that he had not complied with the conditions on which the pardon was tendered. On the 13th July, 1932, the committing magistrate ordered that the enquiry against Abdul Khan could not be made jointly with the other accused. On the 12th May, 1932, Abdul Khan was examined as a witness for the prosecution before the sessions court. He, however, denied all knowledge of the circumstances relating to the offence charged, whereupon he was declared hostile and was cross-examined by the Public Prosecutor. In the course of his cross-examination for the purpose of contradicting him, his confession was read to the

(1) (1931) I. L. R. 58 Calc. 1404.

accused in the presence of the jury. In his evidence before the Sessions Judge he made serious allegations against the police. It may be noted here that, in his evidence before the committing magistrate, Abdul Khan admitted that the deceased and his brothers oppressed their tenants and debtors very much, but, in his evidence before the judge, he said that he could not say if the deceased and his brothers used to oppress the villagers and that he never heard that they oppressed the villagers. The learned advocate for the appellant contended that, in view of Abdul Khan's statement before the committing magistrate and also in view of the fact that the pardon tendered to him was withdrawn, the only object of the prosecution in examining Abdul Khan as a witness in the sessions court was to declare him hostile and to place on the record his confession as evidence, not for the purpose of showing that he is not a truthful witness, but for the purpose of using it as substantial evidence to be placed before the jury and that this procedure had seriously affected the verdict of the jury. The learned advocate representing the Crown relied on section 337 (*2*) of the Code of Criminal Procedure for justifying this procedure. Sub-section (*2*) of section 337 of the Code of Criminal Procedure lays down that every person accepting a pardon shall be examined as a witness in the court of the magistrate taking cognizance of the offence and in the subsequent trial, if any. In this case the pardon was withdrawn long before he was examined in the sessions court. In our opinion, it was not obligatory upon the prosecution to examine Abdul Khan as a witness after he forfeited his pardon. The learned advocate representing the Crown further contended that, as the witness admitted before the committing magistrate certain facts which proved the motive for the crime, the Public Prosecutor was justified in examining him as a witness in the sessions court to prove those facts. Assuming that this position is a correct one in law and that the prosecution would be

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justified in contradicting him by his previous statement, before the committing magistrate, the prosecution was not, in our opinion, justified in reading the confession to the accused before the jury, which he retracted, and which, according to his statement before the committing magistrate, was not a voluntary one. In his evidence before the judge he made serious allegations against the police. It does not appear that the learned judge at all applied his mind to the question whether the statements in the confession, which were sought to be used for contradicting him, were voluntary or not. Before a witness can be contradicted by his previous statement it must be shown that the previous statement was really his voluntary statement. No doubt a witness can be contradicted by his previous statements recorded in writing under section 154 of the Indian Evidence Act, but before this is done it must be shown that the statements were voluntary. If the previous statements were not voluntary, it may be that his present statements are true. Further, before examining Abdul Khan as a witness for the prosecution in the sessions court, the prosecution knew very well that his evidence on the whole would be unfavourable to the prosecution case and, as already observed, it was not obligatory on the prosecution to examine him as a witness before the Sessions Judge. It does not appear, from the circumstances of this case, that the witness unexpectedly turned out hostile to the prosecution and consequently the discretion given to the judge under section 154 of the Evidence Act for allowing the prosecution to cross-examine him evidently with the object of introducing his retracted confession in evidence was not properly exercised. From the mere fact that a witness before the sessions court makes statements relating to a part of the prosecution case different from what he made before the magistrate does not necessarily make him hostile. The facts and circumstances of this case are such that it would have been better if this witness would

not have been examined as a witness at all before the sessions court. In our judgment, though the retracted confession of this witness was read over to him in the presence of the jury, apparently with the object of contradicting him, in the events that have happened, the procedure adopted in this case, by which the retracted confession of this witness, which, according to defence case, was not at all voluntary was placed on the record, has seriously prejudiced the appellants in their trial.

We have looked into the evidence in this case and we are not in a position to say that this is a case where it can be said that there is no evidence to go before the jury and that the appellants should, therefore, be acquitted.

The result, therefore, is that this appeal is allowed. We set aside the verdict of the jury and along with it the conviction and the sentence of the appellants and order their retrial.

Appeal No. 592 of 1933.

The appellant, Abdul Khan, has been convicted by the Sessions Judge of Burdwan under section 302/120B of Indian Penal Code on the unanimous verdict of the jury and sentenced to transportation for life. The case for the prosecution was that there was a conspiracy to murder one Dr. Akhtar Ali, in pursuance of which the said doctor was murdered by some men while he was returning home on the evening of the 29th March, 1932, and that the appellant was one of the conspirators. The defence of the accused in substance was that he was not in the conspiracy and that he knew nothing about it. One of the principal items of evidence, on which the prosecution relied, for substantiating the charge of conspiracy against the appellant and which was placed before the jury for their consideration was his confession which was recorded by a magistrate under section 164 of Criminal Procedure Code. It appears that, after the confession was recorded, the appellant was tendered pardon by the committing magistrate, in the course of the enquiry before him

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against him and other persons and was examined as a witness for the prosecution. The appellant, however, retracted his confession and the pardon was withdrawn. Thereafter, the appellant was placed on his trial, which ended in his conviction. Before the committing magistrate, as well as the Sessions Judge, the appellant stated that before his confession was recorded he was beaten mercilessly by the police. It appears that the magistrate, who recorded the confession, was not available for examination, for reasons which cannot be gathered from the record. In his charge to the jury relating to this confession the learned judge directed them as follows :—

> It is the duty of the judge not to admit a confession into evidence at all unless in his opinion there is no ground for thinking that it has been extorted under undue influence. It is your duty to decide whether the confession is true or not and, in order to do so, you will have to form an independent judgment as to whether the confession was obtained under undue influence or not.

It was contended by the learned advocate for the appellant that these directions were misdirections and that the appellant, on account of this misdirection, was seriously prejudiced in his trial. Under section 298(*a*) of Criminal Procedure Code, it is the duty of the judge to decide all questions of law arising in the course of the trial and specially all questions as to relevancy of facts which it is proposed to prove, and on the admissibility of the evidence. Section 24 of the Indian Evidence Act rules out a confession made by the accused person as irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise proceeding from a person in authority. Therefore, when an objection is taken by the accused as to the relevancy or admissibility of his recorded confession on the ground that it was not voluntary, it is the duty of the judge to decide whether the confession was voluntary or not. In a trial held with the aid of a jury it is the duty of the judge to exclude all inadmissible evidence from the consideration of the jury. In view of the provisions of section 80 of

the Evidence Act, a confession duly recorded by the magistrate with the prescribed certificate appended to it may be presumed to be voluntary and as such admissible, but this admissibility is subject to the restrictions contained in section 24 of the Evidence Act. It is true that, in order to justify the rejection of a confession, a lesser degree of probability would be necessary, inasmuch as, instead of the word "proved," the legislature has used the word "appear" in section 24. In view of these statutory provisions, we are of opinion that before a judge places the confession of the accused before the jury for their consideration as evidence in the case he should carefully consider all the circumstances disclosed in the evidence and come to a decision whether these circumstances do justify a well-founded conjecture which may be sufficient for excluding it from evidence. If after considering the facts and circumstances of the case he comes to the decision that the confession was not voluntary he should exclude it from the evidence in the case and should not place the same before the jury. If, however, he decides that the confession was voluntary, he should place the same before the jury and ask them to decide whether it is true or false, regard being had to the other evidence in the case. He should not leave the question of the admissibility of the confession to the jury for their decision. We have examined the record of this case with some care, including the learned judge's charge to the jury. We are, however, not satisfied that the learned judge's attention was sufficiently directed to this part of his statutory duty when he asked the jury to consider the confession as evidence against the appellant in this case.

In this view of the matter, the verdict of the jury and, along with it, the conviction and sentence of the appellant are set aside and we direct that the appellant be tried according to law.

Appeal allowed, retrial ordered.

A. A.